

REMARKS / ARGUMENTS

The Applicants thank the Office for the careful consideration given to their application in the communication mailed 08/07/2008. In that communication, claims 2 and 12 were rejected under 35 U.S.C. 112, second paragraph for improper Markush claims.

Claims 1 – 4, 10, and 21 – 23 were rejected under 35 U.S.C. 102(e) as being anticipated by Lolley et al. (US 6,696,141). Claims 5, 6, and 16 were rejected under 35 U.S.C. 103(a) as being obvious over Lolley et al. (US 6,696,141). Claims 7 – 9 and 17 were rejected under 35 U.S.C. 103(a) as being obvious over Lolley et al. (US 6,696,141) in view of Sourlis (US 6,023,892). Claims 11 – 15, 18 – 20 and 24 rejected under 35 U.S.C. 103(a) as being obvious over Lolley et al. (US 6,696,141) in view of Cohen et al. (US 2,005,221).

Claims 1, 2, and 8 – 10 were rejected under 35 U.S.C. 102(b) as being anticipated by Cohen et al. (US 2,005,221). Claims 11, 12, 14, and 20 were rejected under 35 U.S.C. 102(b) as being anticipated by Rizzo (US 3,497,417). Claims 3 – 7 were rejected under 35 U.S.C. 103(a) as being unpatentable over Cohen et al. (US 2,005,221). Claims 7 was rejected under 35 U.S.C. 103(a) as being unpatentable over Cohen et al. (US 2,005,221) in view of Sourlis (US 6,023,892). Claims 13, 15, and 16 were rejected under 35 U.S.C. 103(a) as being unpatentable over Rizzo (US 3,497,417). Claims 21 – 23 were rejected under 35 U.S.C. 103(a) as being unpatentable over Sourlis (US 6,023,892) in view of Cohen et al. (US 2,005,221).

Regarding the rejections under 35 U.S.C. 112, second paragraph, claim 2 has been amended to put it into proper Markush format. Claim 12 has been canceled. Although not rejected in the Office action, claim 17 appeared to have similar objectionable language, so this claim has also been amended to make sure it has proper Markush format.

Regarding the rejections based on cited references, the Applicants note

that many of the claims have multiple grounds of rejection and references cited against them. By way of a convenient reference for both Applicants and the Office, and not as an admission that any of the references are prior art, the Applicants have created a claim chart of the claim number versus ground of rejection for the communication of 08/07/2008. The claim chart is attached hereto as Exhibit 1.

Lolley 102(e) Rejections

The Office indicated in its communication of 08/07/2008 that the rejection of claims 1 – 4, 10, and 21 – 23 under 102(e) might be overcome by a showing under 37 CFR 1.132 that the invention disclosed but not claimed in the reference was derived by the inventor of this application and is thus not the invention “by another.” Kevin D. Broad is the common inventor. Attached to this Amendment is such a declaration by Broad. The Applicants suggest that the declaration is sufficient to overcome the 102(e) rejections.

Lolley 103(a) Rejections

The Office indicated in its communication of 08/07/2008 that the rejection of claims 5, 6, and 16 might be overcome by a showing under 37 CFR 1.132 that the invention disclosed but not claimed in the reference was derived by the inventor of this application and is thus not the invention “by another.” Kevin D. Broad is the common inventor. Attached to this Amendment is such a declaration by Broad. The Applicants suggest that the declaration is sufficient to overcome the 103(a) rejections in view of Lolley for claims 5 and 6. Claim 16 has been canceled without prejudice.

Cohen Rejections

The Office asserts that Cohen teaches the use of a wicking cloth on a flashing membrane for drawing away moisture. This assertion has been used to reject claims 1 – 15 and 18 – 24 under 102(b) and singly or in combination with

other references under 103(a). In response, the Applicants assert that the Office has mischaracterized the Applicants' claimed wicking material as corresponding to Cohen's burlap or gunny cloth (col. 2, line 48) treated with a waterproofing material (col. 2, lines 51 – 54), and Cohen's felted fibers (col. 3, line 42) treated with a waterproofing material (col. 3, line 52). These are different materials that serve different purposes, and are in no way equivalent to each other.

In support of their assertion, the Applicants herewith submit a declaration by Lincourt, a co-inventor of the present invention attesting to the technical differences between them. This type of declaration is admissible to rebut the Office's conclusions. *Ex parte* Franklin, 41 USPQ 43 (Pat. Off. Bd. App. 1938). Lincourt's declaration is also offered as an officer in the company that is the successor to the one formed by Cohen et al. that manufactured the invention covered by the Cohen et al. patent. Therefore, he knows the technical details of the Cohen patent and the technical details of the present invention.

Lincourt's declaration shows that the Cohen fabrics do not wick, and therefore cannot be elements present in the present invention. The burlap, gunny, and felt of Cohen are coated with waterproofing material such as asphalt, and therefore cannot wick. In fact, Cohen teaches away from the present invention. The wicking of the present invention material must be absorbent.

Because the wicking material required in the present invention is not present in Cohen, claims 1, 2, and 8 – 10 are not anticipated. Also because the wicking material is not present in Cohen, the cited references do not singly or in combination make up the claimed invention and a prima facie case of obviousness cannot be made against claims 4 – 7 and 21 – 23.

Claims 11 – 16 are canceled without prejudice.

For the foregoing reasons, the Applicants suggest that all the claims as amended are allowable, and respectfully requests that a Notice of Allowance be issued in this case.

Appl. No. 10/710,845
Amdt. dated 9/24/08
Reply to Office action of 08/07/08

Respectfully submitted,

/Phillip E. Decker/

Date: September 24, 2008
Tel. No. 603-766-1910
Fax No. 603-766-1901

Phillip E. Decker, Reg. No. 39,163
Attorney for Applicant
1 New Hampshire Ave., Suite 125
Portsmouth, NH 03801

EXHIBIT 1: CLAIM CHART FOR 10/710.845 AFTER OFFICE ACTION OF 08/07/2008

Claim	Lolley 102(e)	Lolley 103(a)	Lolley/ Sourlis 103(a)	Lolley/ Cohen 103(a)	Cohen 102(b)	Rizzo 102(b)	Cohen 103(a)	Cohen/ Sourlis 103(a)	Rizzo 103(a)	Sourlis/ Cohen 103(a)
1	X				X					
2	X				X					
3	X						X			
4	X						X			
5		X					X			
6		X					X			
7			X				X	X		
8			X		X					
9			X		X					
10	X				X					
11				X		X				
12				X		X				
13				X					X	
14				X		X				
15				X					X	
16		X							X	
17			X							
18				X						
19				X						
20				X		X				
21	X									X
22	X									X
23	X									X
24				X						